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Supreme Court, U.S.
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No. 06-___

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In The

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

MICHAEL VON FERGUSON,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Alabama v. Shelton*, 535 U.S. 654 (2002), this Court held that a person charged with a misdemeanor enjoys a Sixth Amendment right to counsel if his sentence includes suspended jail time. The Court affirmed the judgment of the Alabama Supreme Court, which had invalidated Shelton's suspended jail time, but affirmed his conviction and all other components of his sentence. The question presented is:

If an uncounseled misdemeanant is fined and sentenced to suspended jail time in violation of *Shelton*, is the underlying conviction valid for purposes of enhancing a subsequent criminal charge?

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PETITION FOR WRIT OF CERTIORARI

The State of Utah respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS AND ORDERS

The opinion of the Utah Supreme Court is reported at 2007 UT 1, ___ P.3d ___ (App. at 1-22). The opinion of the Utah Court of Appeals is reported at 2005 UT App 144, 111 P.3d 820 (App. at 23-43). The order of the Third Judicial District Court of Utah, Salt Lake County, under review is unreported (App. at 44-47).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The decision of the Utah Supreme Court was entered on 9 January 2007. After deciding that a prior uncounseled misdemeanor conviction imposing a fine and a suspended sentence cannot be used to enhance the current charge, the court remanded for further proceedings to determine whether respondent knowingly waived his right to counsel. App. at 7. Although the decision did not conclude all litigation in the case, it is final for jurisdictional purposes.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified four categories of cases deemed final for jurisdictional purposes even though further proceedings are anticipated in the lower state courts. *Id.* at 478. This case fits within the third *Cox*

category, which encompasses "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The federal issue "would not survive the remand," because "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* at 482, 481.

This is such a case. Despite further lower court proceedings, under applicable Utah law, "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. Utah law permits prosecution appeals only from certain enumerated types of orders. *See* Utah Code Ann. § 77-18a-1 (West 2004). The catch-all category, relevant here, permits the prosecution to "seek discretionary appellate review of any interlocutory order entered before jeopardy attaches." § 77-18a-1(4). Review of interlocutory orders is discretionary. Utah R. App. P. 5. A petition seeking review of an interlocutory order must be filed "within 20 days after the entry of the order of the trial court." Utah R. App. P. 5(a).

These procedural rules preclude further review of the federal issue in the state courts. On remand, the district court will rule on the factual question of whether respondent was offered appointed counsel and, if so, whether he declined the appointment. If the State prevails on that issue, "the federal issue will be mooted." *Cox Broadcasting*, 420 U.S. at 481. If the State were to lose, "governing state law would not permit [it] again to present [its] federal claims for review." *Id.* Although the State could seek

discretionary review in the Utah appellate courts, the scope of that review would be limited to matters addressed in trial court orders entered within 20 days of the filing of the petition for interlocutory review. Thus, the State could not again seek review of the district court's 21 January 2004 ruling on the *Shelton* question. Moreover, having already decided the question once in this case, the Utah appellate courts would have no reason to grant a second discretionary appeal. And of course, once jeopardy attaches, petitioner loses its right to appeal all but a narrow category of errors, not relevant here. *See* Utah Code Ann. § 77-18a-1(3). In sum, the instant petition offers this Court its last look at this question.

Accordingly, for purposes of this Court's review, the decision of the Utah Supreme Court is as final as the decision of the Kansas Supreme Court in *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516, 165 L.Ed. 429 (2006), and for the same reason: whatever happens on remand, "there [will] be no opportunity for the State to seek further review . . . ." 126 S. Ct. at 2521.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. **Summary of Facts.** Respondent Michael Von Ferguson lived with Julia Jepson for twenty years. R. 336: 28. Throughout this period, she avers, he mentally, physically, and verbally abused her. R. 336: 29. After a series of particularly violent acts and threats, respondent spent six days in jail, and Jepson obtained a protective order. R. 210-12; 336: 31.

After a telephone conversation with Jepson that ended "with a lot of begging to let him come back," respondent agreed to plead guilty to violating the protective order, a class A misdemeanor. R. 109-11; R. 336: 49. His sentence included a fine of $350 and one year in jail, with credit for time served. R. 110-13. The jail time was suspended, and he was placed on probation. *Id.* Court documents indicate that respondent, who is indigent, was not represented by counsel at the guilty plea hearing. R. 18-19, 109-13. They do not indicate whether he waived counsel. *Id.*

Six days later, respondent was discovered on the roof of a Salt Lake City business overlooking Jepson's place of employment. R. 336: 8-10, 35-36. He fled, leaving behind a rifle wrapped in a jacket. R. 336: 12. The rifle was loaded; one round was chambered. R. 336: 13. Respondent was apprehended and charged with four crimes, including violating the protective order after a prior offense, a felony. R. 20-23.

2. **Trial court proceedings.** Under Utah law, a person subject to a protective order "who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor . . . ." Utah Code Ann. § 76-5-108(1) (Supp. 2006). However, if the offense is committed within five years of a prior domestic violence conviction, the offense may be enhanced to a third degree felony. § 77-36-1.1(2)(c). Respondent fits this category. As noted, however, his prior misdemeanor conviction was entered pursuant to a guilty plea; although he was not represented by counsel, his sentence included a suspended jail term. R. 109-11.

The trial court ruled that, under *Alabama v. Shelton*, 535 U.S. 654 (2002), because respondent's prior uncounseled misdemeanor conviction resulted in a suspended sentence, it "cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel." App. at 47. The court rejected "the State's argument that *Shelton* only invalidates the jail sentence given pursuant to an uncounseled misdemeanor conviction, and does not impact the conviction itself." *Id.*

3. **Utah Court of Appeals decision.** On interlocutory review, the Utah Court of Appeals affirmed in relevant part. App. at 42. It agreed with the trial court that because an indigent defendant facing a misdemeanor charge is entitled to counsel when a suspended jail sentence is imposed, "a conviction achieved in violation of this right to counsel cannot be used to support guilt or enhance punishment for another offense unless the right to counsel was knowingly waived." App. at 34 (affirming in part and reversing in part).

4. **Utah Supreme Court Decision.** On certiorari, the Utah Supreme Court affirmed in relevant part. App. at 21. "Both the procedural history and the plain language of the *Shelton* opinion," the court wrote, "suggest that a conviction obtained in violation of the Sixth Amendment is invalid for all purposes and therefore cannot be used to enhance a subsequent criminal charge." App. at 10. The court continued, "While the Supreme Court did not explicitly address the constitutionality of the specific remedy ordered by the Alabama court, it nevertheless implied that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm." *Id.* The Court concluded, "We are therefore convinced that the validity of an uncounseled criminal conviction is not contingent on whether the offense is classified as a misdemeanor or a felony, but rather on whether the Sixth Amendment attaches." App. at 13. The Utah court did not expressly acknowledge that this Court had left undisturbed Shelton's conviction. The court remanded "for a factual determination" on the question of whether respondent knowingly waived his right to counsel. App. at 6.

REASONS FOR GRANTING THE PETITION

In misdemeanor cases, a defendant's right to appointed counsel hinges on the sentence imposed. The Sixth Amendment guarantees appointed counsel only to misdemeanants who receive jail time, whether served or suspended. The parties agree that, in a misdemeanor case where the defendant was deprived of his Sixth Amendment right to counsel, any jail time is unlawful and therefore invalid. The question presented asks whether the underlying conviction is also invalid.

The question is ripe for review. In *Alabama v. Shelton*, 535 U.S. 654 (2002), this Court affirmed just such a conviction without discussion. Two years later, in *Iowa v. Tovar*, 541 U.S. 77 (2004), the United States, as *amicus curiae*, urged the Court to expressly adopt the rule it had assumed in *Shelton*: that a deprivation of counsel in misdemeanor cases "affords no ground for disturbing the underlying conviction." *Id.* at 88 n.10. The Court decided the case on other grounds. The instant petition offers the Court the opportunity to squarely address this recurrent issue.

The issue has broad application. Within the United States, the practice of enhancing subsequent charges or sentences based on prior misdemeanors is ubiquitous. This Court should clarify for the courts of the states and of the United States the legal consequences of a Sixth Amendment deprivation of counsel in a misdemeanor prosecution.

A. The decision of the Utah Supreme Court directly conflicts with the order of this Court in *Alabama v. Shelton*.

Because in misdemeanor cases the right to counsel is contingent upon the defendant's receiving a jail sentence, denial of counsel should invalidate only the jail sentence, not the underlying conviction.

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently

and competently waived." *Nichols v. United States*, 511 U.S. 738, 743 n.9 (1994) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). A felony conviction obtained in violation of the defendant's Sixth Amendment rights is "void." *Custis v. United States*, 511 U.S. 485, 495 (1994) (quoting *Burgett v. Texas*, 389 U.S. 109, 114 (1967)).

In contrast, a defendant charged with a misdemeanor is entitled to appointed counsel only if the sentence ultimately imposed includes imprisonment. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In other words, the Sixth Amendment is not violated when an uncounseled defendant is merely convicted of a misdemeanor. The Sixth Amendment is violated only when, after that conviction, the misdemeanant is sentenced to jail time. The jail time, not the conviction itself, triggers the Sixth Amendment.

In *Shelton*, this Court extended the Sixth Amendment right to appointed counsel to misdemeanants who receive suspended jail time. A suspended sentence is indistinguishable from a served sentence for purposes of the right to counsel, the majority reasoned, because the defendant is unable to challenge the original judgment at any later probation revocation hearing. *Shelton*, 535 U.S. at 667. Although Shelton neither received nor waived counsel, he was given a suspended sentence. He was thus denied the right to counsel. *Id.* at 674.

However, the Court did not disturb Shelton's conviction. It affirmed the judgment of the Alabama Supreme Court. *Id.* at 674. The Alabama court had "affirm[ed] Shelton's conviction but reverse[d] that aspect of his sentence imposing 30 days of suspended jail time." *Ex parte Lereed Shelton*, 851 So.2d 96, 102 (2000). By

affirming the Alabama court, the Court affirmed not only Shelton's conviction, but also an assessment of court costs, a fine of $500, reparations of $25, and a restitution award of $516.69. *See Shelton*, 535 U.S. at 658. The Court even declined to disturb Shelton's term of probation, expressly leaving to the Alabama court the question of whether, despite the invalidation of Shelton's suspended sentence, his probation term could be "freestanding and independently effective." *Id.* at 673-74.

The Utah Supreme Court misread *Shelton*. In its view, "[n]owhere did the Court indicate that an offending sentence could be severed from an invalid conviction, somehow resurrecting the conviction's validity as the State suggests here." App. at 11. It also read *Shelton* to have "implied that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm." App. at 10.

Far from implying that Shelton's conviction was constitutionally infirm, this Court affirmed it. It is true that the Court did not expressly hold that Shelton's conviction was valid; like Shelton himself, the Court assumed that it was. Nevertheless, the Utah Supreme Court's decision in *Ferguson* cannot be squared with this Court's disposition in *Shelton*. The Utah court reversed Ferguson's conviction; this Court affirmed Shelton's. It also invited the Alabama Supreme Court to determine on remand whether "Shelton's probation term [is] freestanding and independently effective." *Shelton*, 535 U.S. at 673-74. This course cannot be reconciled with the view that Shelton's conviction was "constitutionally infirm."

A writ of certiorari should issue to resolve this conflict.

B. The decision of the Utah Supreme Court directly conflicts with decisions of the United States Court of Appeals for the Tenth Circuit.

The decision of the Utah Supreme Court directly conflicts with the holding and reasoning of decisions of the United States Court of Appeals for the Tenth Circuit.

As stated above, the Utah Supreme Court acknowledged that the Sixth Amendment right to appointed counsel in misdemeanor cases hinges on whether the defendant receives jail time. Nevertheless, it ruled that where actual or suspended jail time is imposed in violation of a misdemeanant's Sixth Amendment rights, the conviction itself, not merely the illegal jail sentence, is invalid. App. at 12

In contrast, in two pre-*Shelton* cases, the Tenth Circuit held that, where a misdemeanant receives a jail sentence in violation of his right to counsel, "[o]nly that portion of the sentence concerning imprisonment is invalid." *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281, 1284 (2000) (citing *United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991)).

In *Reilley*, the Tenth Circuit, anticipating *Shelton*, held that, for purposes of a misdemeanant's right to counsel, a suspended sentence is "equally invalid" as a term of actual imprisonment and thus "should be considered a nullity." *Reilley*, 948 F.2d at 654. Consequently, "a conditionally suspended sentence of imprisonment cannot be imposed on a defendant who has been denied counsel." *Id.* However, the court affirmed Reilley's conviction and the remainder of his sentence. *Id.*

Shayesteh is to the same effect. Shayesteh filed a federal habeas petition challenging a misdemeanor conviction entered against him in a city justice court. *Shayesteh*, 217 F.3d at 1282-83. He claimed a denial of counsel in connection with imposition of a 30-day jail sentence and one year probation. *Id.* at 1284. In reliance upon *Reilley*, the Tenth Circuit held that Shayesteh's uncounseled 30-day sentence and term of probation were invalid, but that the remainder of his sentence and the underlying conviction were valid. *Id.* at 1285.

This direct conflict between the state court of last resort and the federal circuit in which it resides is "significant." *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

Other jurisdictions are likewise in conflict on the question of whether, in misdemeanor cases, the conviction underlying an invalid sentence is valid or invalid. *Compare United States v. Ortega*, 94 F.3d 764, 769 (2d Cir. 1996) ("The appropriate remedy for a *Scott* violation . . . is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself."); *United States v. White*, 529 F.2d 1390, 1394 (8th Cir. 1976) ("Although the conviction is valid, we cannot affirm his 90-day suspended prison term since appellant did not clearly waive his right to counsel."), *with State v. Stott*, 586 N.W.2d 436, 441 (Neb. 1998) (a misdemeanor conviction resulting in imprisonment is invalid when obtained against a defendant denied the right to counsel).

A writ of certiorari should issue to resolve this conflict.

C. Granting certiorari would permit this Court to resolve an issue it was prevented from reaching in *Iowa v. Tovar*.

The Court expressed interest in the instant issue in *Iowa v. Tovar*, 541 U.S. 77 (2004), but was unable to reach it.

Tovar was charged with a felony based on two prior misdemeanor convictions. *Id.* at 85. He contended that one of the prior convictions, for which he had served two days in jail, was invalid because his waiver of counsel at the change of plea hearing had been "insufficiently informed and therefore constitutionally invalid." *Id.* at 88. The Iowa Supreme Court held that a court must give a defendant certain specific warnings before accepting a guilty plea. *Id.* at 81. This Court reversed, holding that "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.*

The United States, as *amicus curiae*, proposed an alternative basis for resolving the case. It argued that "a constitutionally defective waiver of counsel in a misdemeanor prosecution, although warranting vacation of any term of imprisonment, affords no ground for disturbing the underlying conviction." *Id.* at 88 n.10. The Court declined to address this contention because the State of Iowa did "not contest the Iowa Supreme Court's determination that a conviction obtained without an effective waiver of counsel cannot be used to enhance a subsequent charge." *Id.*

The instant petition presents the very contention advanced by the United States in *Tovar*. It therefore offers

the Court an opportunity to examine the issue it was unable to reach there.

D. All 50 States And The United States Permit The Use Of Misdemeanor Convictions To Enhance Subsequent Charges Or Sentences.

The question presented is of national significance. The issue implicates the government's ability to enhance later charges, including felony charges, in reliance upon prior misdemeanor convictions.

Most challenges to uncounseled misdemeanors, like the instant one, are collateral. The challenge is raised, not in the misdemeanor case itself, but in a subsequent proceeding in which the prosecution seeks to use the misdemeanor conviction to enhance a later misdemeanor or felony charge. If the prior misdemeanor conviction is ruled invalid, the enhancement may be lost.

Utah's enhancement scheme is far from unique. Indeed, all 50 states, the District of Columbia, and the federal government permit the use of prior misdemeanor convictions to enhance subsequent charges or sentences. *See, e.g.*, App. at 48-51 (listing statutes).

The spectrum of offenses subject to enhancement based on prior misdemeanor convictions is broad, including domestic violence, sex offender registration, theft, and driving under the influence. *See, e.g.*, Ariz. Rev. Stat. Ann. 13-3601.02 (2006) (aggravated domestic violence statute; prior misdemeanor convictions applicable to this charge, which is a felony); Haw. Rev. Stat. 846E-9 (2006) (failure to comply with sex offender registration; second offense is a felony); Mo. Rev. Stat. § 570.040 (1999) (enhancement to

class D felony for third "stealing related offense," when first two resulted in sentence of ten days or more); N.Y. Veh. & Traf. Law § 1193 (Supp. 2006) (second DUI enhanced to class E felony).

This Court should take this opportunity to erase any lingering doubt about the impact on future prosecutions when a misdemeanant receives jail time in violation of his or her Sixth Amendment right to appointed counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF UTAH

State of Utah,

Plaintiff, Petitioner,
and Cross-Respondent,

v.

Michael Von Ferguson,

Defendant, Respondent,
and Cross-Petitioner.

No. 20050376

Third District, Salt Lake
The Honorable Robin W. Reese
No. 031902097

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On Certiorari to the Utah Court of Appeals

(Filed January 9, 2007)

PARRISH, Justice:

¶ 1 The State charged Michael Von Ferguson with violating a protective order, attempted murder, and

related offenses. The protective order charge was enhanced to a felony because Ferguson had previously been convicted of that same charge.[1] A magistrate bound Ferguson over for trial, but the district court reduced the protective order charge to a misdemeanor after concluding that Ferguson's prior conviction had been entered in violation of his Sixth Amendment right to counsel. In doing so, the district court held that the State bore the burden of establishing the validity of Ferguson's prior conviction. On interlocutory appeal, the court of appeals affirmed in part and reversed in part.[2] It agreed that Ferguson's prior conviction could not be used to enhance the subsequent charge if it was obtained in violation of his constitutional right to counsel.[3] It recognized, however, that the prior conviction enjoyed a presumption of regularity and concluded that Ferguson had the burden of producing at least some affirmative evidence that the conviction was constitutionally infirm.[4]

¶ 2 We granted the State's petition for certiorari to determine whether an uncounseled misdemeanor conviction that imposes a suspended sentence in violation of a defendant's right to counsel under *Alabama v. Shelton*[5] can be used to enhance a subsequent criminal charge. We also granted Ferguson's cross-petition, which asks us to determine who bears the burden of establishing the constitutional validity of the prior conviction. For the reasons detailed below, we affirm the court of appeals on both

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[1] *See* Utah Code Ann. § 77-36-1.1 (2003).

[2] *State v. Ferguson*, 2005 UT App 144, ¶ 1, 111 P.3d 820.

[3] *Id.* ¶ 19.

[4] *Id.* ¶ 32.

[5] 535 U.S. 654 (2002).

issues, but clarify the type of evidence on which Ferguson may rely in challenging the validity of his prior conviction.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 Michael Von Ferguson lived with Julia Jepson for twenty years. Jepson alleged that Ferguson abused her and her daughter during that time. On January 8, 2003, Jepson obtained a protective order that prohibited Ferguson from going near, contacting, or harassing her. It also specifically required Ferguson to stay away from Brickyard Kennel, Jepson's place of employment. Ferguson violated the protective order by calling and threatening Jepson multiple times.

¶ 4 On March 18, 2003, Ferguson pled guilty to violating the protective order and was sentenced to one year in jail. The sentence was suspended, and Ferguson was placed on probation. Ferguson was not represented by counsel during these proceedings.

¶ 5 Six days later, police officer R.K. Sullivan investigated a report of a man with a rifle on the roof of a Media Play building located behind Brickyard Kennel. When Sullivan confronted the man, he claimed to be repairing the rain gutter. After speaking with the Media Play manager and learning that no such repair had been scheduled, Sullivan went to the roof. The man was gone, but he had left behind the rifle wrapped in a jacket.

¶ 6 At noon that day, after noticing a significant amount of police and media traffic near the Brickyard Kennel, Jepson turned on the news and learned of a "sniper" on the Media Play roof. She recognized the description as one that matched Ferguson's and immediately

called police. She later identified the jacket found on the roof as belonging to Ferguson.

¶ 7 Police apprehended Ferguson, who admitted to being on the roof on the day in question. Ferguson acknowledged that he should not have been in the area but explained that he was on the roof looking for "tools and things people might leave [there]." He explained that it was necessary for him to carry the rifle to the roof because he had been transporting it on his bike and had no way to lock it up while conducting his rooftop activities.

¶ 8 The State charged Ferguson with, inter alia, violating a protective order and sought to enhance that charge from a class A misdemeanor to a third degree felony based on Ferguson's prior conviction for the same charge. At the preliminary hearing, the State introduced a certified copy of Ferguson's March 18, 2003 conviction for violating the protective order. Ferguson objected, alleging that the conviction had been obtained in violation of his constitutional rights because, on its face, it showed that he had not been represented by counsel. The magistrate denied Ferguson's objection and bound him over on charges of felony violation of a protective order and attempted homicide. Ferguson moved to quash the bindover, arguing that "his prior uncounseled misdemeanor conviction could not be used to enhance the protective order charge to a third degree felony." The State opposed the motion, contending that the prior conviction was valid because Ferguson had no right to counsel for a misdemeanor charge for which he served no jail time.

¶ 9 The district court reduced the protective order charge to a misdemeanor, reasoning that *Alabama v. Shelton* did not permit the State to use Ferguson's prior

uncounseled conviction to enhance the subsequent charge unless Ferguson had knowingly and voluntarily waived his right to counsel. It further held that the State had the burden of establishing such a waiver.

¶ 10 On interlocutory appeal, the court of appeals agreed with the district court that the State could not enhance the protective order charge on the basis of a prior conviction obtained in violation of a defendant's right to counsel.[6] But it reversed the district court's holding that the State bore the burden of establishing the constitutional validity of the uncounseled conviction.[7] Recognizing the presumption of regularity that attached to the conviction, it held that Ferguson had the burden of producing at least some affirmative evidence to rebut that presumption.[8] It therefore remanded the case for a factual determination as to whether Ferguson had waived his right to counsel on the prior conviction.

¶ 11 We granted certiorari on both issues and have jurisdiction pursuant to Utah Code section 78-2-2(3)(a). On certiorari, we review the decision of the court of appeals, not that of the district court.[9] "We conduct that review for correctness, ceding no deference to the court of appeals."[10]

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[6] *Ferguson*, 2005 UT App 144, ¶ 19.

[7] *Id.* ¶ 20.

[8] *Id.* ¶ 31.

[9] *State v. Warren*, 2003 UT 36, ¶ 12, 78 P.3d 590.

[10] *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699 (citation omitted).

ANALYSIS

¶ 12 We begin by considering whether Ferguson's uncounseled misdemeanor conviction, for which Ferguson received a suspended jail sentence, may be used to enhance his subsequent criminal charge. We affirm the court of appeals and conclude that it may not be used unless Ferguson knowingly waived his right to counsel.

¶ 13 We also agree with the court of appeals that Ferguson has the burden of producing at least some evidence to rebut the presumption of regularity attaching to his prior conviction, but we clarify the type of evidence that satisfies this burden. The State produced a certified copy of the prior conviction, which is entitled to a presumption of regularity. Ferguson may rebut this presumption, however, by offering minimal evidence that the conviction was obtained in violation of his right to counsel. If he does so, the burden of establishing the validity of the conviction shifts back to the State. Accordingly, we remand this matter for a factual determination regarding the validity of the prior conviction.

I. A MISDEMEANOR CONVICTION OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT IS INVALID

¶ 14 The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[11] The United States Supreme Court has construed the Sixth Amendment to require that

[11] U.S. Const. amend. VI.

counsel be "provided for defendants unable to employ counsel unless the right is competently and intelligently waived."[12] In *Gideon v. Wainwright,* the Court specifically held that the right to counsel is a fundamental right that applies to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment.[13]

¶ 15 It is a bedrock principle of American jurisprudence that the Sixth Amendment right to appointed counsel attaches when an indigent defendant is charged with a felony. But unlike those charged with a felony, indigent defendants in misdemeanor cases do not necessarily enjoy the right to appointed counsel. Three United States Supreme court cases, *Argersinger v. Hamlin,*[14] *Scott v. Illinois,*[15] and *Alabama v. Shelton,*[16] have explained that the right to appointed counsel attaches in misdemeanor cases only if the defendant actually has been imprisoned or received a suspended sentence. We examine each of these cases in turn.

¶ 16 In *Argersinger,* the Court held that indigent defendants were entitled to counsel in misdemeanor cases that resulted in less than six months' imprisonment.[17] It reasoned that "absent a knowing and intelligent waiver, no person may be imprisoned for any

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[12] *Gideon v. Wainwright,* 372 U.S. 335, 340 (1963) (citing *Johnson v. Zerbst,* 304 U.S. 458 (1938)).

[13] *Gideon,* 372 U.S. at 340-45.

[14] 407 U.S. 25 (1972).

[15] 440 U.S. 367 (1979).

[16] 535 U.S. 654 (2002).

[17] 407 U.S. at 26, 30-31.

offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[18]

¶ 17 The Court clarified the *Argersinger* rule a few years later in *Scott,*[19] explaining that the Sixth Amendment "require[s] only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[20] It reasoned that the right to counsel in misdemeanor cases is implicated only when the trial leads to "actual imprisonment" of the defendant because "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."[21] Under *Scott,* sentences of fines or other punishments for uncounseled misdemeanor convictions are constitutionally permissible so long as no *actual* imprisonment is imposed.[22] If a defendant is actually imprisoned, then the Sixth Amendment attaches, and the defendant must have either received or intelligently waived his right to counsel.[23]

¶ 18 More than two decades later, in *Shelton,* the Court expanded the scope of the actual imprisonment standard, holding that the Sixth Amendment also attaches when a defendant receives a suspended sentence of imprisonment.[24] In *Shelton,* an Alabama district court levied

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[18] *Id.* at 37.

[19] 440 U.S. at 368.

[20] *Id.* at 374.

[21] *Id.* at 373.

[22] *Id.* at 373-74.

[23] *See id.*

[24] 535 U.S. 654, 658 (2002).

a suspended jail sentence in addition to a fine for a misdemeanor violation.[25] The defendant appealed, claiming a violation of his Sixth Amendment right to counsel.[26] The Alabama Supreme Court agreed with the defendant and invalidated the portion of the sentence imposing jail time.[27] On certiorari, the United States Supreme Court addressed "whether the Sixth Amendment right to appointed counsel . . . applies to a defendant" who receives a suspended jail sentence.[28] The Court answered the question in the affirmative, reasoning that the defendant was entitled to counsel because even a suspended sentence could potentially "'end up in the actual deprivation of a person's liberty.'"[29] Accordingly, the suspended sentence fell within the "actual imprisonment" standard articulated by *Scott* and was infirm for failing to comply with the Sixth Amendment.[30]

¶ 19 While the *Shelton* opinion affirmed the decision of the Alabama Supreme Court, which had invalidated the incarceration portion of Shelton's sentence, the Court did not explicitly address the validity of Shelton's underlying conviction. In the present case, the State latches onto this ambiguity, arguing that the underlying conviction remained valid and could be used to enhance subsequent charges. We therefore examine *Shelton* and other United States Supreme Court precedent further. We agree with the court of appeals that "the State reads too much into

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[25] *Id.*

[26] *Id.* at 658.

[27] *Id.* at 659-60.

[28] *Id.* at 658.

[29] *Id.* (quoting *Argersinger,* 407 U.S. at 40).

[30] *Shelton,* 535 U.S. at 662.

Shelton's result."[31] Both the procedural history and the plain language of the *Shelton* opinion suggest that a conviction obtained in violation of the Sixth Amendment is invalid for all purposes and therefore cannot be used to enhance a subsequent criminal charge.

¶ 20 The Supreme Court's affirmance in *Shelton* is an indication of its agreement with the Alabama court's ruling that the suspended sentence gave rise to a Sixth Amendment violation. Because the issue was not before it, however, the Supreme Court did not address the validity of the underlying conviction and the nonincarceration components of Shelton's sentence.[32]

¶ 21 While the Supreme Court did not explicitly address the constitutionality of the specific remedy ordered by the Alabama court, it nevertheless implied that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm. It repeatedly described the Sixth Amendment as protecting against invalid convictions, not merely invalid sentences.[33] The Court reiterated that the Sixth Amendment protects against invalid convictions by stressing that a defendant cannot be "jailed absent a *conviction* credited as reliable."[34] It also indicated that a "defendant ha[s] a recognized right to counsel when *adjudicated*

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[31] *State v. Ferguson*, 2005 UT App 144, ¶ 13, 111 P.3d 820.

[32] *See Shelton*, 535 U.S. at 673-74.

[33] *Id.* at 662 ("A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.").

[34] *Id.* at 665 (emphasis added).

guilty,"[35] emphasizing that the Sixth Amendment right applies to the conviction itself, not only to the sentence. Nowhere did the Court indicate that an offending sentence could be severed from an invalid conviction, somehow resurrecting the conviction's validity as the State suggests here.

¶ 22 Other United States Supreme Court precedent similarly implies that a conviction obtained in violation of the Sixth Amendment is invalid and therefore cannot be used to enhance a subsequent sentence. For example, in *Nichols v. United States,* which was decided before *Shelton,* a defendant's sentence was enhanced from 210 to 235 months as a result of a prior uncounseled misdemeanor conviction.[36] As punishment for this misdemeanor conviction, the defendant was fined but not incarcerated.[37] The Court upheld the sentencing enhancement, holding that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[38] It reasoned that such enhancements were permissible because the Sixth Amendment did not attach to nonincarceration convictions.[39]

¶ 23 The State reads *Nichols* as holding that any valid misdemeanor conviction can be used to enhance a subsequent sentence. While we do not disagree with this proposition, we emphasize that it is the underlying

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[35] *Id.* at 664 (emphasis added).

[36] 511 U.S. 738, 740-41 (1994).

[37] *Id.*

[38] *Id.* at 749.

[39] *Id.* at 746-47.

conviction that must be valid. An uncounseled misdemeanor conviction imposing a sentence of incarceration, either actual or suspended, is not valid. Therefore, a conviction obtained in violation of *Scott* or *Shelton* cannot be used for enhancement purposes.

¶ 24 This result is consistent with the reasoning and language of Supreme Court precedent regarding the right to counsel generally. In *Gideon v. Wainwright,* the Court reasoned that because the right to counsel is so "fundamental and essential to fair trials," it was required to reverse the indigent defendant's uncounseled conviction.[40] Similarly, in *Burgett v. Texas,* the Court held that it would be impermissible for courts "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment."[41] And in *United States v. Tucker,* the Court held that a sentencing court could not consider a defendant's previous uncounseled conviction because doing so would "erode the principle of [*Gideon v. Wainwright*]."[42]

¶ 25 The State attempts to distinguish these cases by pointing out that they all involve felonies. It acknowledges that a violation of a defendant's right to counsel in a

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[40] 372 U.S. 335, 336, 344-45 (1963).

[41] 389 U.S. 109, 115 (1967).

[42] 404 U.S. 443, 449 (1972) (citation omitted), *superseded on other grounds by statute; see also Loper v. Beto,* 405 U.S. 473, 483 (1972) ("[T]he use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law."); *Johnson v. Zerbst,* 304 U.S. 458, 468 (1938) ("If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.").

felony proceeding invalidates the underlying conviction. Nevertheless, the State maintains that "[b]ecause the right to counsel in misdemeanor prosecutions depends on the imposition of jail time, violation of that right requires invalidating only the jail time."

¶ 26 We fail to see the basis for the alleged distinction. Although these cases involved felonies, the United States Supreme Court has specifically held that "their rationale has relevance to any criminal trial . . . where an accused is deprived of his right to liberty."[43] The ideas about the fundamental right to counsel articulated in these cases are applicable to all criminal prosecutions involving the deprivation of liberty.[44] We are therefore convinced that the validity of an uncounseled criminal conviction is not contingent on whether the offense is classified as a misdemeanor or a felony, but rather on whether the Sixth Amendment attaches. If a conviction is obtained in violation of a defendant's Sixth Amendment right to counsel, then the conviction, not merely the offending sentence, is invalid and may not provide the basis for enhancing a subsequent criminal charge.[45]

¶ 27 In sum, under *Shelton,* the Sixth Amendment attached to Ferguson's prior conviction when he received a one-year suspended sentence. He consequently had the

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[43] *Argersinger,* 407 U.S. at 32.

[44] *Id.* at 32-33.

[45] *Cf. Lewis v. United States,* 445 U.S. 55, 66-67 (1980) (holding that an uncounseled felony conviction may form the basis for imposing a civil firearms disability under federal firearms statute because Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm).

right to be represented by counsel. Because he was not, Ferguson's conviction is invalid and cannot be used to enhance the subsequent criminal charge unless he waived his right to counsel.[46]

¶ 28 Before moving to the second issue presented for our review, we pause to clarify the practical result of our ruling. The Supreme Court's analytic approach to the right to counsel, as reflected in the *Scott* and *Shelton* opinions, often creates a practical dilemma. This is so because a defendant's right to counsel in a misdemeanor case is dependent upon the sentence he receives. Before sentencing, the court does not know whether an uncounseled conviction will be valid under *Scott* because no prison time will be imposed or whether it will be invalid under *Shelton* because the defendant will receive jail time or a suspended sentence. It is therefore difficult for courts to determine when to appoint counsel for an indigent defendant charged with a misdemeanor.

¶ 29 To avoid the risk of invalidating a conviction in misdemeanor cases, we emphasize that the courts of this state may not impose incarceration-based sentences in cases where an indigent defendant has neither received nor intelligently waived the right to counsel. As a result, in those misdemeanor cases where the court elects not to appoint counsel, it restricts its sentencing options accordingly.

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[46] *See* discussion *infra* Part II.

II. WAIVER OF THE RIGHT TO COUNSEL

¶ 30 Having concluded that Ferguson's prior conviction cannot be used to enhance his subsequent charge unless he waived his right to counsel, we must now determine whether Ferguson did so. This requires us to assess which party bears the burden of establishing the validity of the underlying conviction.

¶ 31 Ferguson contends that the State had the burden of establishing a constitutionally adequate waiver of counsel because the judgment of the prior conviction reflects that he was not represented by counsel. Although Utah courts generally recognize a presumption of regularity when the State introduces a prior conviction for enhancement purposes, Ferguson argues that this presumption does not attach to a judgment that shows on its face that the defendant was not represented by counsel. In contrast, the State contends that even judgments based on uncounseled convictions enjoy a presumption of regularity, thereby shifting to Ferguson the burden of coming forward with evidence to establish that he did not knowingly waive his right to counsel.

¶ 32 We agree with the State. Even those judgments based on uncounseled convictions are entitled to a presumption of regularity. In such cases, however, the presumption may be rebutted by the defendant's own testimony. The burden then shifts to the State to establish the validity of the conviction.

A. *Previous Convictions Are Entitled to a Presumption of Regularity*

¶ 33 In *State v. Triptow,* we articulated a framework for analyzing the validity of an underlying conviction in

the context of a charging enhancement.[47] In *Triptow,* a defendant whose sentence had been enhanced under a habitual criminal statute appealed the enhancement, arguing that the state had the burden of proving that he was represented by counsel on the charge giving rise to the enhancement.[48] We disagreed, reasoning:

> A previous judgment of conviction so proven is entitled to a presumption of regularity, including a presumption that the defendant was represented by counsel. This presumption satisfies any initial burden the State may have of proving that the defendant had or knowingly waived counsel. After proof of the previous conviction is introduced, the burden is on the defendant to raise the issue and produce some evidence that he or she was not represented by counsel and did not knowingly waive counsel. Once the defendant has presented some evidence, the presumption of regularity is rebutted and the burden shifts to the State to prove by a preponderance of the evidence that the defendant was in fact represented or knowingly waived representation.[49]

¶ 34 Under this test, the State may satisfy its initial burden of establishing the validity of the conviction by producing a certified copy of the conviction. But Ferguson contends that the *Triptow* presumption of regularity does not attach to the underlying conviction in this case because that conviction reflects that he was not represented by counsel. In so arguing, Ferguson relies on the United

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[47] 770 P.2d 146 (Utah 1989).

[48] *Id.* at 146.

[49] *Id.* at 149.

States Supreme Court case of *Burgett v. Texas*.[50] In *Burgett,* the Court held that because "the judgment on its face showed that petitioner was not represented by counsel," it was "constitutionally infirm under the standards of *Gideon v. Wainwright*" and could not "be used against a person either to support guilt or enhance punishment for another offense."[51]

¶ 35 In *Parke v. Raley,*[52] however, the United States Supreme Court "distinguished *Burgett* in a way that directly responds to Ferguson's arguments."[53] In *Parke,* the Court upheld the constitutionality of a Kentucky burden-shifting scheme similar to that adjudicated by this court in *Triptow.* The Kentucky scheme accorded judgments a presumption of regularity but allowed defendants to rebut that presumption.[54] The Court reasoned that Kentucky's burden-shifting rule did not violate due process because "even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant."[55] *Parke* specifically cites *Triptow* in support of the proposition that "allocating some burden to the defendant is [not] fundamentally unfair."[56]

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[50] 389 U.S. 109 (1967).

[51] *Id.* at 112, 115.

[52] 506 U.S. 20 (1992).

[53] *State v. Ferguson,* 2005 UT App 144, ¶ 23, 111 P.3d 820.

[54] *Parke,* 506 U.S. at 33-34.

[55] *Id.* at 31.

[56] *Id.* at 33.

¶ 36 *Parke* also limited *Burgett*, reasoning that *Burgett* was premised on outdated assumptions.[57] When Burgett's prior conviction was entered, "state criminal defendants' federal constitutional right to counsel had not yet been recognized, . . . so it was reasonable to presume that [Burgett] had not waived a right he did not possess."[58] Such a presumption is no longer accurate because courts are assumed to have complied with well-established requirements ensuring that any waiver of the right to counsel is made knowingly and intelligently.[59] Accordingly, *Burgett* can no longer be read to "stand[] for the proposition that every previous conviction used to enhance punishment is 'presumptively void' if waiver of a claimed constitutional right does not appear from the face of the record."[60]

¶ 37 In arguing that his prior conviction is not entitled to a presumption of regularity, Ferguson also relies on language from our decision in *Lucero v. Kennard*.[61] There, we indicated that because of the "special status" of right-to-counsel claims, "[a] court may not presume waiver of the right to counsel unless there is some evidence that the defendant affirmatively acquiesced to the waiver."[62] Relying on this language, Ferguson argues that even if a judgment generally enjoys a presumption of regularity, waiver of counsel cannot be presumed. But

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[57] *Id.* at 31.

[58] *Id.*

[59] *See Parke*, 506 U.S. at 31 (referring to the requirement that a defendant's guilty plea be knowing and voluntary).

[60] *Id.*

[61] 2005 UT 79, 125 P.3d 917.

[62] *Id.* ¶ 25.

neither *Lucero* nor the cases that it cites stand for such a proposition. *Lucero* cites *Carnley v. Cochran*[63] and *State v. Hamilton,*[64] but neither of these cases states that a waiver of counsel cannot be presumed. Rather, they hold only that it is impermissible to presume a waiver of counsel where a trial record is silent on the issue of waiver.[65] Neither addresses whether the presumption of regularity applies to judgments reflecting an uncounseled conviction.[66]

¶ 38 When read with *Triptow, Lucero* stands only for the proposition that deprivation of counsel claims enjoy a "special status" in our jurisprudence because of the constitutional importance of counsel.[67] We said nothing in *Lucero* to eliminate the *Triptow* presumption of regularity that we afford to judgments, even those judgments reflecting an uncounseled conviction.

¶ 39 In this case, the State presented a certified copy of Ferguson's conviction on the misdemeanor protective order charge. Under *Triptow,* we presume that this conviction was validly entered, even though it reflects that Ferguson was not represented by counsel. The burden then shifted to Ferguson to rebut this presumption by offering evidence that he "did not knowingly waive counsel."[68]

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[63] 369 U.S. 506, 516-17 (1962).

[64] 1987 Utah LEXIS 638, at *5.

[65] *Id.; see also Carnley,* 369 U.S. at 516-17.

[66] *See Carnley,* 369 U.S. at 516-17; *Hamilton,* 1987 Utah LEXIS 638, paras. 5-6.

[67] *Lucero,* 2005 UT 79, ¶ 25.

[68] *Triptow,* 770 P.2d at 149.

B. *Minimal Evidence Is Required to Rebut the Presumption of Regularity*

¶ 40 To rebut the presumption of regularity, Ferguson must present "some evidence that he ... was not represented by counsel and did not knowingly waive counsel."[69] Relying on the court of appeals' statement in *State v. Gutierrez,*[70] the State asserts that more than a self-serving affidavit, or similar evidence, is required to rebut the presumption of regularity. We are troubled, however, that requiring defendants to produce more than a minimal amount of rebuttal evidence could undermine their constitutional rights.[71] Although a defendant bears some burden of proof in a collateral challenge to an unappealed prior conviction, the State bears the ultimate burden.[72] Requiring that defendants produce evidence in addition to their own testimony would shift to the defendants the ultimate burden of proof – the very result we sought to avoid in *Triptow* by adopting the burden-shifting framework.[73] It would also undermine the "special status" that we afforded to deprivation of counsel claims in *Lucero.*[74] We consequently overrule *Gutierrez* to the extent that it is inconsistent with this opinion and emphasize that our reference in *Triptow* to "some evidence" may be satisfied by a defendant's own testimony.

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[69] *Id.*

[70] 2003 UT App 95, ¶ 11, 68 P.3d 1035.

[71] *See State v. Heaton,* 958 P.2d 911, 917 (Utah 1998).

[72] *Parke,* 506 U.S. at 30-31.

[73] *Triptow,* 770 P.2d at 149.

[74] *Lucero v. Kennard,* 2005 UT 79, ¶ 25, 125 P.3d 917; *see also Lackawanna County Dist. Attorney v. Coss,* 532 U.S. 394, 404 (2001) (indicating that deprivation of counsel claims "warrant[] special treatment among alleged constitutional violations").

¶ 41 In summary, although Ferguson must do more than merely produce a copy of the conviction reflecting that he was not represented by counsel, he need only come forward with some evidence to rebut the presumption of regularity. His own testimony that he did not waive his right to counsel is sufficient for this purpose. If Ferguson produces such evidence, the burden then shifts to the State to demonstrate by a preponderance of the evidence that Ferguson knowingly waived his right to counsel.[75]

CONCLUSION

¶ 42 We affirm the court of appeals' holding that a previous uncounseled conviction imposing a suspended sentence cannot be used to enhance a subsequent criminal charge unless the defendant knowingly and intelligently waived his right to counsel. In determining whether a defendant did so, a previous conviction is presumed valid unless the defendant can rebut that presumption by offering evidence that he did not validly waive his right to counsel. This burden is minimal, however, and can be satisfied by the defendant's own testimony. The burden then shifts to the State to establish the validity of the waiver. We therefore affirm the court of appeals and remand this case for further proceedings in accordance with this opinion.

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[75] *See, e.g., State v. Baker*, 485 N.W.2d 237, 248 (Wis. 1992) (holding that the defendant overcame the presumption of regularity when he produced both a self-serving affidavit stating that he had not waived his right to counsel and an affidavit from his attorney indicating that he had made a good faith effort to find records from the prior proceeding).

¶ 43 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Durrant, and Justice Nehring concur in Justice Parrish's opinion.

111 P.3d 820

This opinion is subject to revision before publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

State of Utah, Plaintiff and Appellant v. Michael Von Ferguson, Defendant and Appellee.	)	OPINION (For Official Publication) Case No. 20040077-CA 2005 UT App 144

Third District, Salt Lake Department
The Honorable Robin W. Reese

Attorneys: Mark L. Shurtleff and J. Frederic Voros, Jr., Salt Lake City, for Appellant
Vernice S. Trease and Debra Meek Nelson, Salt Lake City, for Appellee

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Before Judges Greenwood, Jackson, and Orme.

ORME, Judge:

(Filed March 24, 2005)

¶ 1 This case arises from a much publicized incident initially reported as involving a possible rooftop terrorist in Salt Lake City. *See Rooftop Gunman Spurs S.L. Search,* Deseret News, Mar. 24, 2003, at B2; Ashley Broughton, *Man Charged in Rooftop Gun Incident,* Salt Lake Tribune,

Mar. 27, 2003, at C2. We have before us an interlocutory appeal from an order by the trial court reducing a charge of violating a protective order, under Utah Code section 76-5-108, from a third degree felony to a class A misdemeanor. *See* Utah Code Ann. § 76-5-108 (2003). We affirm in part, and reverse and remand in part.

BACKGROUND

¶ 2 On January 21, 2003, a protective order was issued prohibiting Defendant Michael Von Ferguson from having contact with a girlfriend he had lived with for twenty years. The protective order specifically required that Ferguson stay away from his girlfriend's place of employment, as well as other places she frequented. On March 18, 2003, Ferguson pled guilty to violating the protective order, a class A misdemeanor, and he was sentenced to 365 days in jail. The jail sentence was suspended in its entirety, and Ferguson was placed on probation. Ferguson was not represented by counsel when he entered his plea. Later that same month, Ferguson was spotted near his girlfriend's place of employment, in violation of the protective order.[1] On March 26, 2003, the State filed an

[1] The circumstances surrounding the discovery that Ferguson had been near his girlfriend's place of employment in violation of the protective order are far from routine. A police officer was flagged down by two people who reported they had seen a man with a rifle in an area near the girlfriend's place of employment. When the officer reached the area, he noticed a man on the roof of a business located behind the girlfriend's place of employment. The officer approached the business and asked the man why he was up there. The man indicated that he was repairing a rain gutter. The officer sought to verify his response with the business's manager, who informed him that no repairs had been scheduled for the roof. The officer then went on to the roof, but the man had left by that time. However, on the roof the officer did find a

(Continued on following page)

information that alleged, in part, that Ferguson had violated the protective order again.[2] This time the State charged Ferguson with a third degree felony based on his prior conviction for violation of the protective order. At the preliminary hearing, Ferguson objected to the use of the prior conviction to enhance the second violation to a third degree felony, arguing that an uncounseled plea could not be used to enhance a subsequent offense. The trial court overruled the objection and bound Ferguson over for trial on the third degree felony charge of violating the protective order.

¶ 3 Ferguson filed a motion to quash the bindover, renewing his argument that his prior, uncounseled misdemeanor conviction could not be used to enhance the subsequent offense, and he urged the court to strike the third degree felony enhancement. The trial court heard arguments on the issue and granted Ferguson's motion to quash the bindover on the enhancement of the protective

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loaded rifle, wrapped in a jacket. Ferguson was linked to the jacket, and he later admitted to the police that he had indeed been on the roof. He explained, however, that he was merely up there looking for tools and other things people might "normally" leave on a roof. He also admitted to taking the rifle onto the roof, but claimed he did so only because he had been carrying the rifle with him on his bicycle, and when he had parked his bicycle to get on the roof he had no way of securing the rifle to the locked bicycle, thus logically necessitating that he take the rifle with him. Apparently he did not explain why one engaged in urban roof scavenging would need to be so heavily armed.

[2] The protective order violation was the least of Ferguson's worries. We note that the information also alleged that Ferguson had committed attempted homicide, burglary, and theft of a firearm. Although Ferguson was not bound over for trial on the burglary and theft charges, he still faces the attempted homicide charge, a second degree felony, the proceedings on which have been continued pending the outcome of this interlocutory appeal.

order violation, leaving the charge as a class A misdemeanor rather than a third degree felony. The State petitioned this court for permission to appeal the trial court's interlocutory order. We granted the petition.

ISSUES AND STANDARD OF REVIEW

¶ 4 This appeal presents two issues. First, we are asked to review whether the trial court correctly concluded that Ferguson's prior misdemeanor conviction cannot be used to enhance his second violation of the protective order. The prior conviction resulted in a suspended jail term, and the conviction was based on an uncounseled guilty plea. Ferguson insists such a conviction will not support felony enhancement unless the prosecution presents evidence that the defendant knowingly and voluntarily waived his right to counsel. The State specifically asks this court to reverse the trial court's interpretation of United States Supreme Court precedent. Our review of a lower court's interpretation of case law presents a legal question that we review for correctness. *See State v. Leyva,* 951 P.2d 738, 741 (Utah 1997).

¶ 5 Second, the State asks this court to determine who rightfully bears the burden of proof on the question of whether a defendant knowingly or voluntarily waived his right to counsel in the prior plea proceeding. The trial court concluded the burden was on the State to present evidence that the Defendant knowingly and voluntarily waived his right to counsel. "Because the allocation of burdens of proof is a question of law," we grant no discretion to the trial court's allocation of the burden of proof and also review that determination for correctness. *Beaver*

County v. Utah State Tax Comm'n, 916 P.2d 344, 357 (Utah 1996).

ANALYSIS

I. Use of Prior Uncounseled Misdemeanor Convictions to Enhance a Subsequent Offense

¶ 6 The State argues on appeal that under controlling United States Supreme Court precedent, a defendant's prior misdemeanor conviction may be used to enhance a subsequent criminal charge, even though the defendant may have been denied the Sixth Amendment right to counsel during the prior proceeding. Relying on the United States Supreme Court case of *Alabama v. Shelton,* 535 U.S. 654 (2002), the trial court disagreed with the State's position and held that because Ferguson did not have counsel when he entered a guilty plea the first time he violated the protective order, and because he received a suspended sentence of incarceration, the prior conviction could not be used to enhance the second violation of the protective order unless Ferguson knowingly and voluntarily waived his right to counsel. We agree with the trial court.

¶ 7 The Sixth Amendment to the United States Constitution provides that in "criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of counsel for his defence." U.S. Const. amend. VI. In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the United States Supreme Court established that the Sixth Amendment right to counsel was applicable to the states, by virtue of the Fourteenth Amendment, and assured indigent defendants who are charged with crimes the fundamental right

to have the assistance of counsel in order to ensure they receive a fair trial. *See id.* at 342-45.

¶ 8 *Shelton* is the third of a trio of United States Supreme Court cases that define this right to counsel as concerns indigent defendants who have been charged with misdemeanor offenses. In *Argersinger v. Hamlin,* 407 U.S. 25 (1972), the United States Supreme Court first held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. In *Scott v. Illinois,* 440 U.S. 367 (1979), the Court drew the line for triggering the right to appointed counsel when an indigent defendant is charged with a misdemeanor crime at "actual imprisonment," effectively excluding from the scope of the right the defendant who is only fined and not sentenced to a term of imprisonment. *Id.* at 373-74. Thus, prior to *Shelton,* the right to appointed counsel attached to the prosecution of a misdemeanor offense only if it led to actual imprisonment, even if only for a brief period of time.

¶ 9 In *Shelton,* the Court clarified that under its holdings in *Argersinger* and *Scott,* a defendant may not receive a suspended sentence of imprisonment "that may 'end up in the actual deprivation of a person's liberty' . . . unless the defendant was accorded 'the guiding hand of counsel' in [defending against] the prosecution for the crime charged." *Shelton,* 535 U.S. at 658 (quoting *Argersinger,* 407 U.S. at 40). In other words, the Court determined in *Shelton* that even a suspended sentence constitutes a term of imprisonment within the meaning of *Argersinger* and *Scott,* even if actual incarceration does not immediately follow the imposition of the sentence. *See id.*

¶ 10 Nevertheless, in *Shelton* the United States Supreme Court affirmed the Supreme Court of Alabama's decision to invalidate the part of the defendant's sentence imposing suspended jail time when the defendant's Sixth Amendment right had been violated, while at the same time affirming the defendant's underlying conviction and the remaining fine imposed as part of his sentence. *See id.* at 659-60. The State makes much of the fact that the Supreme Court in *Shelton* did not reverse the defendant's conviction in its entirety, but only invalidated the suspended jail term as the remedy for the violation of the defendant's right to counsel. As a result, the State argues that the trial court in this case misread *Shelton.*

¶ 11 The State asserts that under *Shelton,* when a defendant is convicted of a misdemeanor based on an uncounseled guilty plea and the conviction results in a sentence of incarceration, whether suspended or imposed, the fact that the plea was uncounseled only results in the invalidation of the incarceration sentence but does not impact the underlying conviction itself. Thus, the State reasons, the conviction could still be used to enhance a subsequent offense. The State argues that *Shelton* stands for the broad proposition that a sentence imposing actual or suspended jail time for a misdemeanor will be invalidated if the defendant was not afforded the right to counsel or did not duly waive the right, but the conviction itself and any portion of the sentence imposing some penalty other than incarceration will remain valid. While we agree with the State that a proper remedy for the failure to provide counsel to an indigent defendant who has been sentenced to an actual or suspended jail term during the prosecution of the underlying misdemeanor includes vacating that portion of the sentence, we are not convinced

that the State has accurately stated the law set forth in *Shelton* as it pertains to the general validity of the underlying conviction and whether it can be used to enhance the severity of a subsequent offense. On the contrary, we are persuaded that *Shelton* did not directly address the issue now before us.

¶ 12 *Shelton* involved a direct appeal attacking the validity of an indigent defendant's uncounseled misdemeanor conviction and the resulting sentence and did not address the question of whether an uncounseled misdemeanor conviction could be used to enhance a criminal charge or penalty for a subsequent offense. *See id.* at 658. Moreover, the situation the instant appeal presents is also distinguishable from the one in *Shelton* because the sentence Ferguson received for the prior misdemeanor conviction is fundamentally different from that handed down to the defendant in *Shelton*. In addition to the suspended jail time, the defendant's sentence in *Shelton* also included lesser penalties, like fines, that by themselves would not afford a defendant the right to counsel. *See id.* Thus, once the part of the sentence that afforded the defendant the right to counsel was removed, the defendant's underlying conviction could still rightly stand as concerns those parts of the sentence that would not otherwise trigger the right to counsel. Ferguson's sentence, however, did not include anything but the suspended one-year jail term and probation, leaving no independent, nonincarceration component of the sentence that can rationalize Ferguson's conviction.

¶ 13 Consequently, *Shelton* only directly answered the question of whether the imposition of a suspended jail sentence is the same as receiving a sentence of "actual imprisonment" for the sake of triggering a defendant's

Sixth Amendment right to appointed counsel under *Argersinger* and *Scott*. Thus, *Shelton* does not directly speak to the issue before us as concerns the use of a prior uncounseled misdemeanor conviction to enhance a subsequent offense when the conviction was obtained in violation of the right to appointed counsel. *Shelton* only tells us that Ferguson had the right to counsel during the proceedings that resulted in the suspended term of incarceration for the prior misdemeanor offense. However, when we take *Shelton's* limited holding and place it within the framework established by United States Supreme Court precedent concerning the propriety of using a conviction to enhance criminal charges or penalties when the conviction has been obtained in violation of a defendant's right to appointed counsel, we are further convinced that the State reads too much into *Shelton's* result.

¶ 14 The State cites *Nichols v. United States*, 511 U.S. 738 (1994), as the leading case on using prior misdemeanor convictions to enhance later charges, contending that *Nichols* held "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 749. The State reads *Nichols* to stand for the proposition that an otherwise valid misdemeanor conviction is also valid for purposes of enhancing a subsequent offense. The State relies on *Nichols* to argue that Ferguson's prior uncounseled misdemeanor conviction may still be used to enhance his second violation of the protective order because the underlying conviction is still valid according to the State's reading of *Shelton*. However, since we have rejected the State's reading of *Shelton*, the State's reliance on *Nichols* in this regard is flawed. Nevertheless, the rule the State cites

from *Nichols* that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction," *id.*, still has application under our view of *Shelton*. Because *Shelton* holds that the imposition of a suspended jail term is the same as receiving a term of "actual imprisonment," as outlined in *Scott*, a violation of the right to counsel extended under *Shelton* is, therefore, on precisely the same footing as a violation of the right to counsel afforded by *Scott*.

¶ 15 Thus, *Shelton* supplements *Scott* as concerns the application of the right to counsel by giving an indigent defendant the right to counsel when the sentence imposed is a suspended term of imprisonment. As a result, after *Shelton*, the rule the State cites from *Nichols* might more appropriately be stated as holding that "an uncounseled misdemeanor conviction, valid under *Scott* [and *Shelton*] because no [actual or suspended] prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* In other words, the rule from *Nichols* means that so long as an uncounseled misdemeanor conviction has not resulted in a sentence of imprisonment under *Scott* or *Shelton*, that conviction can otherwise be used for enhancement purposes because the defendant did not have the Sixth Amendment right to counsel in the first place. It follows, therefore, that an uncounseled misdemeanor conviction that results in an actual *or suspended* term of imprisonment, like the one at issue in this case, cannot be used for enhancement purposes under *Nichols*, absent a showing that the defendant waived the right to counsel.

¶ 16 Our conclusion is buttressed by other United States Supreme Court opinions that suggest the use of a prior

uncounseled conviction is problematic when a defendant has been denied the right to counsel. While it is true that the United States Supreme Court "has never suggested that an uncounseled conviction is invalid for all purposes," *Lewis v. United States,* 445 U.S. 55, 66-67 (1980), the Court has recognized "that under the Sixth Amendment an uncounseled felony conviction cannot be used for certain purposes." *Id.* at 66. For example, in *Burgett v. Texas,* 389 U.S. 109 (1967), the Court held that a conviction invalid under *Gideon v. Wainwright's* extension of the Sixth Amendment right to counsel to indigent criminal defendants could not be used for enhancement of punishment under a State's recidivist statute. *See id.* at 111, 114-16.

¶ 17 Similarly, in *United States v. Tucker,* 404 U.S. 443 (1972), the Court held that such a conviction could not be considered by a court in sentencing a defendant after a subsequent conviction. *See id.* at 449. Likewise, in *Loper v. Beto,* 405 U.S. 473 (1972), the Court disallowed the use of the conviction to impeach the general credibility of the defendant. *See id.* at 482. Throughout its decisions, the Supreme Court has acknowledged that "there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect," *Custis v. United States,* 511 U.S. 485, 496 (1994), thus calling into question the propriety of using a conviction obtained in violation of constitutional protections for enhancing subsequent criminal charges and penalties.

¶ 18 The Utah Supreme Court has likewise acknowledged that the subsequent use of prior uncounseled convictions is questionable under United States Supreme Court precedent. *See State v. Triptow,* 770 P.2d 146, 147 (Utah 1989) (acknowledging "that unless counsel was

knowingly waived, an uncounseled prior conviction may not be used in a later prosecution, 'either to support guilt or enhance punishment for another offense'") (quoting *Burgett,* 389 U.S. at 115); *State v. Branch,* 743 P.2d 1187, 1192 (Utah 1987) (agreeing "that an involuntary guilty plea cannot be used to enhance or support a subsequent conviction"); *State v. Saunders,* 699 P.2d 738, 743 (Utah 1985) (holding that requirements of *Burgett* were satisfied because defendant was represented by attorney when he entered guilty plea).

¶ 19 As a result, we fail to see how the mere affirmance of the defendant's underlying conviction in *Shelton* can be read to overrule the United States Supreme Court's long-standing prohibitions against the use of uncounseled convictions for certain purposes when the convictions have been obtained in violation of the Sixth Amendment right to counsel. Consequently, we agree with the trial court that, under *Shelton,* an indigent defendant facing a misdemeanor charge is entitled to counsel when a suspended jail sentence is imposed and that a conviction achieved in violation of this right to counsel cannot be used to support guilt or enhance punishment for another offense unless the right to counsel was knowingly waived. We turn now to the waiver issue.

II. Waiver of the Right to Counsel

¶ 20 In concluding that Ferguson's prior misdemeanor conviction could not be used to enhance any subsequent charges he faced without a showing that he had waived his right to counsel, the trial court also concluded that the burden was on the State to present evidence that Ferguson

knowingly and voluntarily waived his right to counsel. We disagree with this aspect of the trial court's conclusion.

¶ 21 In *State v. Triptow,* 770 P.2d 146 (Utah 1989), the Utah Supreme Court considered "the question of who bears the burden of proof on the issue of representation or waiver of counsel in prior proceedings leading to a conviction that is used to increase the penalty in a subsequent prosecution." *Id.* at 148. In *Triptow,* the Court also determined the degree to which a "presumption of regularity . . . attends any judgment which has not been appealed from." *Id.* In doing so, the Court reviewed the approach taken by a number of states to consider the question of who bears the burden of proof on the issue of representation and waiver of counsel. *See id.* The Court decided to follow the lead of several states that

> acknowledge the presumption of regularity but allow the defendant to rebut that presumption by merely raising the issue and producing some evidence that counsel was not present and was not waived. This is enough to shift the burden to the state to affirmatively prove either representation or waiver by at least a preponderance of the evidence.

Id. The Court reasoned that because "the defendant is the one best situated to know whether his or her sixth amendment right was infringed in the earlier proceedings . . . it is appropriate to presume that the right to counsel has been observed unless the defendant affirmatively contends to the contrary." *Id.* at 149. Where the defendant does not present any evidence of irregularities in a prior proceeding, a court may properly presume that a defendant's prior convictions occurred while he was represented by counsel or that he knowingly waived counsel. *See State*

v. Williams, 773 P.2d 1368, 1373-74 (Utah 1989); *State v. Pooler,* 2002 UT App 299,¶ 7, 56 P.3d 979.

¶ 22 Ferguson contends, however, that the presumption of regularity should not attach to his prior conviction because it is obvious from the face of the judgment of conviction itself that he did not have the benefit of counsel and because the judgment of conviction is also silent on whether he waived his right to counsel. Indeed, the certified copy of his prior conviction indicates that Ferguson appeared pro se and is also void of any reference to whether Ferguson was advised of or waived his right to counsel. Ferguson argues that where the conviction clearly shows that a defendant was not represented by counsel and where the record is silent on whether the defendant waived his right to counsel, the presumption of regularity does not attach and, thus, the burden remains on the State.

¶ 23 Ferguson supports this argument by asserting that *Triptow,* when read together with *Burgett v. Texas,* 389 U.S. 109 (1967), stands for the proposition that a presumption of regularity attaches to a conviction only when there is no indication on the face of the conviction that a defendant was not represented by counsel. While it is true that in *Burgett* the United States Supreme Court held that a prior conviction could not be used for sentencing enhancement because the record of the earlier proceedings did not show that the defendant had waived his right to counsel, *see id.* at 114-15, the Supreme Court has subsequently distinguished *Burgett* in a way that directly responds to Ferguson's arguments. *See Parke v. Raley,* 506 U.S. 20, 29-31 (1992).

¶ 24 In *Parke,* the Supreme Court was asked to determine if Kentucky's allocation of the burdens of proof, when examining a prior conviction's validity, was constitutionally sound. *See id.* at 22-23. Similar to Utah's burden of proof allocation under *Triptow,* in *Parke* the Kentucky court required the prosecution to first prove the existence of the judgment of conviction on which it intended to rely. Once that was proven, a presumption of regularity attached, and the burden was shifted to the defendant to produce some evidence that his rights were infringed. *See id.* at 24. If the defendant could undercut the presumption of regularity, then the burden shifted back to the prosecution to show that the judgment was entered in such a way that it did not violate the defendant's rights. *See id.*

¶ 25 In *Parke,* the defendant challenged the use of two prior convictions to charge him under Kentucky law as a "persistent felony offender" on the ground that the convictions were invalid under *Boykin v. Alabama,* 395 U.S. 238 (1969), because the records of the convictions failed to affirmatively show that his guilty pleas were knowing and voluntary. *Parke,* 506 U.S. at 22-23. *See Boykin,* 395 U.S. at 242 (holding trial court erred in accepting a defendant's guilty plea without a record affirmatively showing that the plea was knowing and voluntary). The defendant in *Parke* also argued that the trial court had erroneously given the two prior convictions a presumption of regularity because *Burgett* "stands for the proposition that every previous conviction used to enhance punishment is 'presumptively void' if waiver of a claimed constitutional right does not appear from the face of the record." *Parke,* 506 U.S. at 31 (citation omitted).

¶ 26 The Supreme Court rejected the defendant's argument that *Boykin's* presumption that a conviction is

invalid applies equally to a defendant's collateral attack on his previous convictions when it is claimed the defendant's guilty pleas were taken without any record affirmatively showing the pleas were knowing and voluntary. *See id.* at 30. The Court instead determined that when a conviction was challenged on collateral review, the "'presumption of regularity' that attaches to final judgments," which is "deeply rooted in our jurisprudence," could not be ignored "even when the question is waiver of constitutional rights." *Parke,* 506 U.S. at 29. Thus, the Court in *Parke* found "no good reason to suspend the presumption of regularity" since the case was not one "in which an extant transcript [was] suspiciously 'silent' on the question whether the defendant waived constitutional rights," but rather was one in which "no transcripts or other records of the earlier plea colloquies exist[ed] at all." *Id.* at 30. In fact, the Court stated that "it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." *Id.* The Court also did not read *Burgett* to stand for the broad proposition that the defendant asserted it did, especially in light of the fact that the prior conviction at issue in *Burgett* had been entered at a time when a "state criminal defendant['s] federal constitutional right to counsel had not yet been recognized, and so it was reasonable to presume that the defendant had not waived a right he did not possess." *Id.* at 31.

¶ 27 Thus, in *Parke,* the Court concluded that just because a record was unavailable, its unavailability alone could not be used to show noncompliance with well-established

constitutional requirements.[3] *See id.* As a result, we see Ferguson's reliance on *Burgett* as misplaced and are otherwise persuaded by the Court's holding in *Parke,* combined with the Utah Supreme Court's holding in *Triptow,* that even though the certified copy of Ferguson's conviction is silent about his waiver of counsel, or whether he was informed of his rights, the presumption of regularity still attaches and the initial burden is on Ferguson to adduce some evidence that he did not knowingly waive his right to counsel.

¶ 28 Ferguson argues that even if he bears the burden of producing "some evidence that he . . . was not represented by counsel and did not knowingly waive counsel," *Triptow,* 770 P.2d at 149, his burden has been met because the certified copy of his prior conviction indicates on its face that Ferguson appeared pro se and because it is also devoid of any reference to whether Ferguson was advised of, or waived, his right to counsel. Ferguson relies on *In re Smith,* 925 P.2d 169 (Utah 1996), to suggest that by pointing out that on the certified copy of his conviction he appeared pro se, Ferguson has presented the same type of evidence the defendant in *Smith* presented to rebut the presumption of regularity. However, a closer reading of *Smith* reveals that the defendant in *Smith* produced more

[3] The instant case is on a different footing in that this is not a case where there is no transcript of the plea hearing on the earlier charge. Rather, neither side has seen fit to secure a copy of the transcript before now, each arguing that the other side has the initial burden and, absent some showing to the contrary, that he or it is entitled to prevail. Presumably the parties will now have an incentive to secure the transcript and learn what actually happened concerning any waiver of Ferguson's right to counsel.

evidence to rebut the presumption of regularity than just a copy of a judgment of conviction.

¶ 29 In *Smith,* the defendant presented enough of a record of the proceedings, in which he claimed he was denied the right to counsel, to allow the reviewing court to see whether he was represented by counsel or whether he had knowingly waived counsel. *See id.* at 172-73. It was because of that type of evidence that the reviewing court was able to say he had successfully rebutted the presumption of regularity, thereby shifting the burden back to the prosecution.[4] *See id.*

¶ 30 In *State v. Gutierrez,* 2003 UT App 95, 68 P.3d 1035, this court addressed the issue of what type of evidence will be sufficient to meet the defendant's burden to produce "some evidence" in order to rebut the presumption of regularity as established in *Triptow.* In *Gutierrez,* the defendant challenged the use of two prior DUI convictions for enhancement purposes, arguing that the guilty pleas that were the basis of the convictions were not voluntary.

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[4] We also note that *In re Smith,* 925 P.2d 169 (Utah 1996), concerned a different type of scenario than this case presents. *Smith* involved the disciplinary action of a Utah-licensed attorney who had been convicted in Wisconsin of theft by fraud and false swearing. *See id.* at 170. In order to prevent his Wisconsin convictions from being used as the basis for disciplinary action in Utah, the attorney argued that he was denied his right to counsel in his Wisconsin criminal trial and, as a result, his convictions were void and ineligible for full faith and credit in Utah. *See id.* at 172. Consequently the Utah Supreme Court's review focused mainly on whether the attorney's right to counsel had been fully and fairly litigated in the Wisconsin courts. *See id.* at 173. The Utah Supreme Court, after examining the records of the Wisconsin proceedings, was satisfied that, under *Triptow's* burden of proof allocation scheme, each party had met its burden of proof and that the Wisconsin court's conclusion that the attorney had knowingly waived his right to counsel had been fully and fairly litigated. *See id.* at 172-73.

See id. at ¶ 5. This court reiterated the Utah Supreme Court's holding in *Triptow* that

> once the State has proven a prior conviction, a presumption of regularity arises, and the burden shifts to the defendant to produce "some evidence" of involuntariness. Upon the showing of some evidence of involuntariness, the burden shifts back to the State to prove voluntariness by a preponderance of the evidence.

Id. at ¶ 7 (quoting *Triptow,* 770 P.2d at 149). The defendant in *Gutierrez* produced no evidence of involuntariness on one conviction, *see* 2003 UT App 95 at ¶ 8, 68 P.3d 1035, and to challenge the other conviction the defendant produced an affidavit, which he claimed sufficiently rebutted the presumption of regularity as it applied to that conviction. *See id.* at ¶ 9. This court concluded that a "self-serving affidavit" was insufficient, *see id.* at ¶ 10, and that the "defendant must demonstrate the involuntariness of his plea by some evidentiary method other than his own bare assertions." *Id.* at ¶ 12. Thus, this court noted in *Gutierrez* "that a defendant seeking to rebut the presumption of regularity must produce a transcript, testimony regarding taking of the plea, a docket sheet, or other affirmative evidence" in order to effectively rebut the presumption. *Id.* at ¶ 11.

¶ 31 Although the certified copy of the conviction in this case indicates that Ferguson appeared pro se in the prior proceeding, which surely dispels any suggestion that he was represented by counsel, the fact that the written judgment of conviction is silent on the issue of whether Ferguson was informed about or waived his right to counsel does not rebut the presumption of regularity that attaches to his conviction, including the presumption that

he was in fact informed of his right to counsel and voluntarily waived it. Indeed, the detailed recitations required in this regard are usually to be found in a transcript of the plea colloquy and/or an affidavit submitted at the time of the plea, and are not typically included on the face of the judgment of conviction. The burden thus remains on Ferguson to produce some evidence to put in question whether he was adequately advised of and actually waived his constitutional right to counsel in the prior proceeding. If Ferguson introduces a transcript, testimony from those who were present during the prior proceeding, or some other form of affirmative evidence that tends to refute the presumption that he was informed of his right to counsel, or that he knowingly and voluntarily waived it, he will successfully shift the burden to the State to prove affirmatively, by a preponderance of the evidence, Ferguson's valid waiver of the right to counsel.

CONCLUSION

¶ 32 We agree with the trial court's conclusion that under *Alabama v. Shelton,* 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), a defendant facing a misdemeanor charge is entitled to counsel when a term of incarceration is imposed, regardless of whether the term of incarceration is suspended or actually served. We also affirm the trial court's conclusion that under *Shelton,* Ferguson's prior uncounseled misdemeanor conviction, which resulted in a suspended one-year term of imprisonment, cannot be used to enhance his second violation of the protective order to a third degree felony *unless* Ferguson knowingly and voluntarily waived his right to counsel. Nevertheless, we reverse the trial court's decision with regard to which party bears the burden of proof on the question of whether

Ferguson waived his right to counsel in the prior proceeding. We remand for further proceedings in accordance with this opinion so that it may be properly ascertained whether Ferguson validly waived his right to counsel.

/s/ _____
Gregory K. Orme, Judge

¶ 33 WE CONCUR:

/s/ _____
Pamela T. Greenwood, Judge

/s/ _____
Norman H. Jackson, Judge

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IN THE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT IN AND FOR
THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- MICHAEL VON FERGUSON, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER Case No. 031902097 Judge ROBIN W. REESE

(Filed Jan. 21, 2004)

The Defendant's Motion to Quash the Bindover having come before this Court for hearing in the above entitled matter on October 24th, 2003 and November 3rd, 2003, in which Defendant was represented by counsel, Vernice Trease, and the State was represented by counsel, B. Kent Morgan and Alicia H. Cook, the Court having fully considered the written memoranda and oral arguments of counsel, this Court now enters its FINDINGS OF FACT and CONCLUSION OF LAW and ORDER.

FINDINGS OF FACT

1. On March 18th, 2003, the defendant pled guilty to violating a protective order, a class A misdemeanor, before Judge Medley in District Court case number 031901111, and was sentenced to 365 days in jail. The defendant was not represented by counsel when he entered his plea. The jail sentence was suspended in its entirety and the defendant was placed on probation.

2. On March 26th, 2003, the state filed an information alleging that the defendant had committed Attempted Homicide, Violation of a Protective Order, Burglary, and Theft of a Firearm. The protective order violation was enhanced to a third degree felony based on the defendant's prior conviction in case number 031901111.

3. A preliminary hearing was held on August 26th, 2003 before Judge Iwasaki. The State presented evidence that the defendant, while carrying a loaded rifle, had climbed onto the roof of a building neighboring the victim's workplace. The State also offered a certified copy of the prior conviction to support the enhanced protective order violation. Defense counsel objected to the use of the prior conviction, and argued that an uncounseled plea could not be used to enhance a subsequent offense. The Court overruled the objection and at the conclusion of the hearing found sufficient probable cause to bind over the Attempted Homicide and Protective Order Violations charges.

4. On October 16th, 2003, counsel for the defense filed a Motion to Quash the Bindover. The defense argued that the defendant's prior uncounseled misdemeanor conviction could not be used to enhance the subsequent offense, and urged the

Court to strike the enhancement. The defense also argued that the evidence presented at the preliminary hearing failed to establish that the defendant had actually violated the protective order.

5. This Court heard oral arguments on October 24th, 2003. At the conclusion of the arguments, the Court requested that counsel brief the application of *Alabama v. Shelton* to the instant case, and scheduled further arguments for November 3rd, 2003.

6. During the November 3rd hearing, counsel for the State argued that *Shelton* prohibits the imposition of a suspended jail sentence given to a misdemeanor defendant who did not have counsel, but does not invalidate the underlying conviction for purposes of enhancing future crimes. Counsel for the defendant argued that, whenever a suspended jail sentence is given to a misdemeanor defendant, *Shelton* does not permit the use of that conviction for enhancement.

CONCLUSIONS OF LAW

1. The defense's motion to quash the bindover for insufficient evidence is denied. The State met its burden at the preliminary hearing of showing probable cause regarding the Violation of a Protective Order charge. The defendant's efforts to commit homicide against the victim also constitute a violation of the protective order, which prohibits the defendant from committing or attempting to commit acts of violence against the victim.

2. The defense's motion to quash the bindover of count II as a third degree felony is granted. The

Court agrees with the defense that under *Alabama v. Shelton*, a defendant facing a misdemeanor charge is entitled to counsel when a jail sentence is rendered, regardless of whether the sentence is suspended or actually imposed. Defendant Ferguson did not have counsel at the time he entered his guilty plea and received a suspended sentence, therefore the prior conviction cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel. The Court disagrees with the State's argument that *Shelton* only invalidates the jail sentence given pursuant to an UNCOUNSELED misdemeanor conviction, and does not impact the conviction itself.

ORDER

IT IS HEREBY ORDERED that the enhancement to count II is stricken, and count II stands as a class A misdemeanor.

DATED this 21 day of January, 2004.

BY THE COURT:

/s/ [SEAL]
Judge ROBIN W. REESE

Approved as to form:

/s/ _____
Vernice Trease

ALA. CODE § 32-5A-191 (Supp. 2006) (enhancing fourth DUI conviction to felony); ALASKA STAT. § 28.35.030 (Supp. 2006) (enhancing second DUI conviction to felony); ARIZ. REV. STAT. ANN. § 13-3601.02 (2006) (enhancing domestic violence charge to felony based on prior misdemeanor convictions); ARIZ. REV. STAT. ANN. § 28-1382, -1383 (2006) (enhancing DUI conviction to felony based on prior misdemeanor convictions, *see Grabbe v. Superior Ct.*, 745 P.2d 145 (Ariz. Ct. App. 1987)); ARK. CODE ANN. § 3-3-205 (Supp. 2005) (enhancing second offense of sale or possession of alcohol without a license to felony, if prior conviction was within three years); ARK. CODE ANN. §§ 16-90-803, 16-97-101, 16-97-103(2) (stating that prior misdemeanor convictions are relevant in sentencing); CAL. PENAL CODE § 502.7(g) (West 1999) (enhancing crime of obtaining telephone or telegraph services by fraud to felony based on prior misdemeanor conviction within five years); COLO. REV. STAT. § 18-10-103 (2004) (enhancing second conviction of professional gambling within five years of first offense to felony); CONN. GEN . STAT. § 53a-40d (Supp. 2002) (enhancing persistent offenders of enumerated crimes sentenced to higher degree of offense, including from misdemeanor to felony); DEL. CODE ANN. tit. 11, § 614 (Supp. 2004) (enhancing second offense of abuse of sports official to felony); D.C. CODE § 34-1264.02 (2007) (enhancing third offense of cable theft within ten years to felony); FLA. STAT. § 316.193 (Supp. 2005) (enhancing third and subsequent DUI offenses to felonies); GA. CODE ANN. § 9-13-16 (2006) (requiring two to four years confinement for second offense of fraudulent levies); HAW. REV. STAT. § 846E-9 (Supp. 2006) (enhancing second offense of failure to comply with sex offender registration to felony); IDAHO CODE ANN. §§ 18-5613, -5614 (2006) (enhancing third and subsequent convictions of prostitution and solicitation of prostitute to felonies);

720 ILL. COMP. STAT. 5/12-30 (2006) (enhancing second conviction of violation of protective order to felony); IND. CODE § 25-26-14-23 (2001) (enhancing second conviction of purchase of drugs from unlicensed person to felony); IOWA CODE § 155A.24 (Supp. 2005) (enhancing third offense of unlawful sale of prescription drugs to felony); KAN. STAT. ANN. § 8-1567 (Supp. 2003) (enhancing third and subsequent DUI convictions to felonies); KY. REV. STAT. ANN. § 211.990 (West 2006) (enhancing second offense of creating a public health nuisance to felony); LA. REV. STAT. ANN. § 14:98 (Supp. 2005) (enhancing third DUI conviction to felony-like offense, mandating prison time for at least one year); ME. REV. STAT. ANN. tit. 17-A § 1252(4-A) (2006) (stating that prior convictions serve to enhance sentencing class); MD. CODE ANN., CRIM. LAW § 5-905 (LexisNexis Supp. 2002) (permitting double punishment for subsequent crimes under controlled dangerous substances title, regardless of degree of previous conviction); MASS. GEN. LAWS ch. 94C, § 32D (2006) (enhancing maximum sentence for subsequent conviction for possessing, distributing, or manufacturing class E controlled substance from nine to eighteen months); MICH. COMP. LAWS §§ 777.11, 777.55 (2006) (stating that consideration of prior misdemeanor history under sentencing guidelines applicable to felonies); MINN. STAT. §§ 169A.24 to .27 (Supp. 2006) (enhancing fourth conviction of driving while impaired to felony); MISS. CODE ANN. § 63-11-30 (Supp. 2004) (enhancing third conviction of driving under the influence to felony); MO. REV. STAT. § 570.040 (Supp. 2005) (enhancing third "stealing related offense" to felony when first two resulted in sentence of ten days or more); MONT. CODE ANN. §§ 61-8-714, 61-8-731 (Supp. 2005) (enhancing DUI to felony on fourth offense); NEB. REV. STAT. § 28-518 (2006) (enhancing subsequent theft convictions to felonies); NEV. REV. STAT. § 207.010 (2006) (enhancing "Habitual Fraudulent Felons"

charge based upon prior convictions involving fraud); N.H. REV. STAT. ANN. § 265:82-b, II(c) (Supp. 2006) (enhancing DUI conviction to felony on fourth offense); N.J. STAT. ANN. § 2C:44-3 (West 2005) (allowing extended term of imprisonment for "persistent offenders," or those with two convictions for crimes committed at different times); N.M. STAT. § 66-8-102 (Supp. 2005) (enhancing DUI conviction to felony on fourth and subsequent offenses); N.Y. VEH. & TRAF. LAW § 1193 (Supp. 2006) (enhancing second DUI conviction to class E felony); N.C. GEN. STAT. § 14-33.2 (Supp. 2004) (enhancing to "habitual misdemeanor assault," a class H felony, upon third conviction for assault in fifteen years); N.D. CENT. CODE § 39-08-01(2) (2005) (enhancing DUI conviction to felony on fifth offense committed within seven years); OHIO REV. CODE ANN. § 4511.195(G)(1)(d) (LexisNexis Supp. 2002) (enhancing DUI conviction to felony if driver has three or four DUI convictions in last six years, or five or more DUI convictions in last 20 years); OKLA. STAT. tit. 21, § 51.2 (2002) (enhancing punishment for subsequent felony offenders, even if prior felony occurred over 10 years earlier, if defendant was convicted of "misdemeanor involving moral turpitude" in interim); OR. REV. STAT. § 165.065(3)(b) (2003) (enhancing conviction of negotiating a bad check to felony if offender has been convicted of negotiating a bad check or theft by deception within five years); 204 PA. CODE §§ 303.1 to .18 (2007) (sentencing guidelines enhancing punishment for both felony and misdemeanor criminal convictions if defendant has one or more prior misdemeanor convictions); 42 PA. CONS. STAT. ANN. § 9721(b) (2007) (mandating that court follow sentencing guidelines or provide written statement explaining why guidelines were not followed); R.I. GEN. LAWS 1956, § 31-27-2(d)(3)(i) (Supp. 2006) (enhancing third DUI conviction to felony); S.C. CODE ANN. § 56-5-2945 (Sup.. 2003) (enhancing

second conviction for failure to stop to felony); S.D. CODIFIED LAWS § 32-23-4 (Supp. 2006) (enhancing third DUI conviction to felony); TENN. CODE ANN. § 39-13-511(2) (Supp. 2006) (enhancing third indecent exposure conviction to felony if offender is over eighteen years old and victim is younger than thirteen years old); TEX. PENAL CODE ANN. § 49.09 (Vernon Supp. 2005) (enhancing third DUI conviction to felony); UTAH CODE ANN. § 61-2-17(2) (2006) (enhancing second conviction for violation of State real estate laws to felony); VT. STAT. ANN. tit. 23, § 1210 (2005) (enhancing third DUI conviction to felony); VA. CODE ANN. § 18.2-270(c) (2006) (enhancing third DUI conviction to felony); WASH. REV. CODE § 46.61.502(6) (Supp. 2006) (enhancing DUI conviction to felony if defendant has four prior DUI convictions within 10 years); W. VA. CODE § 61-2-16a(c) (Supp. 2006) (enhancing second battery conviction to felony); WIS. STAT. § 940.43(5) (2005) (enhancing second conviction of intimidation of a witness to felony); WYO. STAT. ANN. § 6-2-501(f)(ii) (Supp. 2004) (enhancing third battery against a household member conviction to felony). *See also* U.S. Sentencing Guidelines Manual § 4A1.1(c) (adding one point for each prior sentence not resulting in at least sixty days of imprisonment); § 4A1.2(c) (excluding certain misdemeanors from calculation under certain conditions); 18 U.S.C. §§ 922(g)(9), 924(a)(4) (Supp. 2006) (subjecting prohibited persons, including misdemeanants convicted of domestic violence, to potential five year non-concurrent federal sentence, though conviction is deemed misdemeanor for purposes of any other law).